FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 6 1950
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 325.

ANNIE HAHR PAWLEY, PETITIONER,

VS.

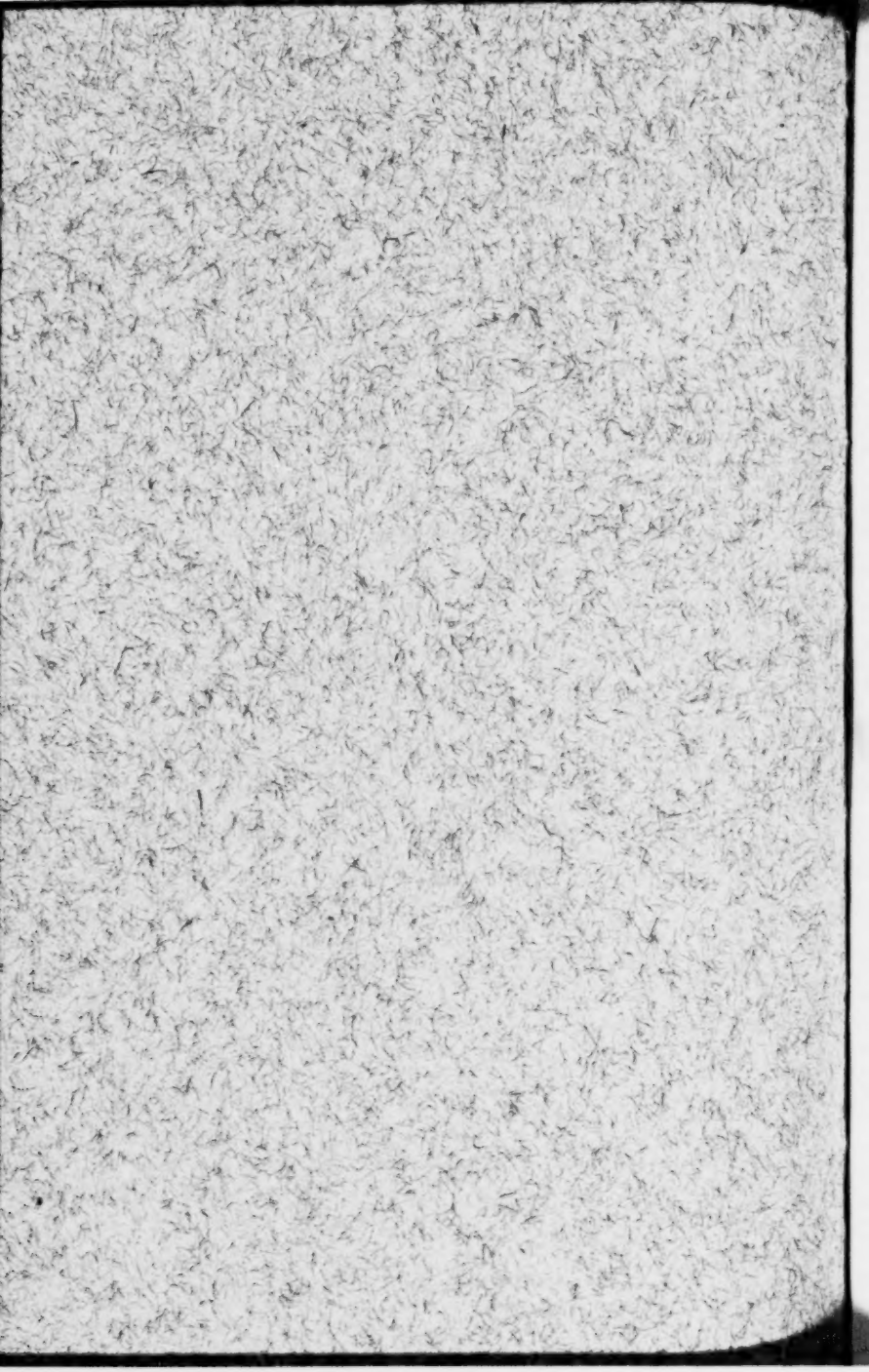
WILLIAM D. PAWLEY, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

BRIEF IN OPPOSITION TO CERTIORARI.

PAUL R. SCOTT,
W. M. PRESTON,
A. L. MCCARTHY,
ROBERT H. ANDERSON,
Miami, Florida,
Attorneys for Respondent.

SCOTT M. LOFTIN,
Jacksonville, Florida,
Of Counsel.



BLEED THROUGH POOR COPY

INDEX

Petitioner's Inchoate Dower Rights Were Not Protected by the Federal Constitution 3

The Factual Allegations of the Petition Are Inaccurate and Incomplete 7

What Was Necessary for Petitioner to Become Vested with Dower Rights? 11

The Marital Contract Is Not Within the Purview of the Federal Constitution 13

Conclusion 14

AUTHORITIES CITED

Adams vs. Adams, (1941) 147 Fla. 267, 2 So. 2d 855, 314 U. S. 572 6

Allen vs. Alleghany Company, (1905) 196 U. S. 458 4

Bennett vs. Bennett, (1946) 157 Fla. 627, 26 So. 2d 650 4

Bowler vs. Bowler, (1947) 159 Fla. 447, 31 So. 2d 751 4

Cabell vs. Cabell's Adm'r, (1858) 58 Ky. (1 Metc.) 319 14

Estin vs. Estin, (1948) 334 U. S. 541 3

Fahs vs. Merrill, (1944) 142 F. 2d 651 ..... 5, 6, 12

Ferry vs. Spokane P. & S. R. Company, (1922) 258 U. S. 314 5

Florida Statutes, 1941, Section 65.10 1

Florida Statutes, 1941, Section 731.34 11

Herzog vs. Trust Company of Easton, (1914) 67 Fla. 54, 64 So. 426 4

Hilton vs. Guyot, (1895) 159 U. S. 113 10

Hunt vs. Hunt, (1879) 131 U. S. Append. clxv. 13

Leffler vs. Leffler, (1942) 151 Fla. 455, 10 So. 2d 799 6

Livingston vs. Livingston, (1903) 173 N. Y. 377, 66 N. E. 123, 93 Am. St. Rep. 600, 61 L. R. A. 800 14

Lynde vs. Lynde, (1901) 181 U. S. 183 4
Mayer vs. Reinecke, (1942) (C. C. A., 7) 130 F. 2d 350, cert. den. 317 U. S. 684 12
Maynard vs. Hill, (1888) 125 U. S. 190 13
Merrill vs. Fahs, (1943) 51 F. Supp. 120, 324 U. S. 308, 888 ..... 5, 6, 12
North vs. Ringling, (1942) 149 Fla. 739, 7 So. 2d 476 4
Parker vs. Parker, (1945) 155 Fla. 635, 21 So. 2d 141 ..... 4, 10
Randall vs. Keiger, (1874) 23 Wall. 137 5
Rugh vs. Ottenheimer, (1877) 6 Ore. 231, 25 Am. Rep. 513, 38 Pac. St. Rep. 231 14
State vs. Tutty, (1890) 41 F. 753, 7 L. R. A. 50 14
Trustees of Dartmouth College vs. Woodward, (1819) 4 Wheat. 518 13
White vs. White, (1849) 5 Barb. (N. Y.) 474, 4 Howard's Pract. 102 14

BLEED THROUGH POOR COPY

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 325.

ANNIE HAHR PAWLEY, PETITIONER,

VS.

WILLIAM D. PAWLEY, RESPONDENT.

BRIEF IN OPPOSITION TO CERTIORARI.

The bare bones of this case are these:

The petitioner, Annie Hahr Pawley, filed a bill in the Circuit Court of Dade County, Florida, against William D. Pawley, respondent, seeking alimony unconnected with causes of divorce under the provisions of Section 65.10, Florida Statutes, 1941[1] (R. 1-9).[2] To meet the require-

[1]"65.10 *Alimony unconnected with causes of divorce.*—If any husband having ability to maintain or contribute to the maintenance of his wife or minor children shall fail to do so, the wife, living with him or living apart from him through his fault, may obtain such maintenance or contribution upon bill filed and suit prosecuted as in other chancery causes; and the court shall make such orders as may be necessary to secure to her such maintenance or contribution."

[2]The transcript references are to the printed record. In every case emphasis is supplied unless otherwise indicated.

ments of the statute under which she proceeded she alleged that the defendant was her husband, that he had the ability to maintain her and his minor children, and had failed to do so.

Pawley's defense was twofold: (1) That he was not the plaintiff's husband, having been divorced from her by the decree of a Cuban court; (2) that it was not true that he had failed to support her; on the contrary, he had contributed to her, over the last five years,[3] almost $150,000.00, or approximately $30,000.00 a year (R. 9-22). He also claimed laches.

The plaintiff challenged the validity of the Cuban decree of divorce, the *bona fides* of Pawley's residence in Cuba, and the jurisdiction of the Court to enter it (R. 24).

The Chancellor found for Pawley on all issues (R. 494-504). He held that Pawley was a legal resident of Cuba, that the Court had jurisdiction, that it had proceeded in accordance with due process, and that the decree was entitled to recognition under rules of comity (R. 502-503). He also held that Pawley had contributed adequately to the support of his former wife (R. 503). He held, furthermore, that Pawley had remarried upon the faith of the validity of the Cuban decree of divorce and was living with his second wife, and that his former wife, the plaintiff, had full knowledge of the entry of the Cuban decree and for more than three years had failed to take any action to contest it, which barred her from obtaining relief (R. 503). Accordingly, the Chancellor dismissed the bill although he taxed the costs against Pawley (R. 503-504).

---

[3]Commencing at about the time the Cuban proceedings were instituted and continuing until the time of the filing of the answer in this case.

BLEED THROUGH POOR COPY

The petitioner appealed to the Florida Supreme Court. After full hearing that Court held, under the authority of the Estin case,[4] that the Cuban decree of divorce was divisible: (a) It was a valid dissolution of the bonds of matrimony; (b) but it did not operate to destroy Pawley's obligation to support his former wife, as no such question was before the Cuban court. The Chancellor's decree accordingly was affirmed in part and reversed in part. The Cuban decree of divorce was held to be entitled to recognition under rules of comity. It did not preclude the petitioner from enforcing her right to support from her former husband whenever he failed to recognize his obligation to do so (R. 539). But inasmuch as the evidence showed that he had "contributed adequately—if not lavishly," to her support, the evidence justified, yea required, the dismissal of her bill (R. 532).

When consideration is given to the fact that the statute under which the petitioner was proceeding cast upon her the burden of proving not only that Pawley was her husband but that, having ability to maintain her, he had failed to do so, which she utterly failed to sustain, the bill was properly dismissed *whether the Cuban divorce was valid or not.*

It is difficult to see what Federal question is presented.

PETITIONER'S INCHOATE DOWER RIGHTS WERE NOT PROTECTED BY THE FEDERAL CONSTITUTION.

The Cuban decree of divorce was not entitled to full faith and credit under the Federal Constitution. This has been expressly so held by the Florida Supreme Court with

---

[4]334 U. S. 541.

reference to Cuban decrees and the respondent has never contended otherwise (R. 75).

Parker v. *Parker*, (1945) 155 Fla. 635, 21 So. 2d 141.

And whether or not the courts of a state should recognize the judgment of a court of a foreign nation on principles of comity is a matter within their sole and exclusive jurisdiction.

Lynde v. *Lynde*, (1901) 181 U. S. 183.

Allen v. *Alleghany Company*, (1905) 196 U. S. 458.

The basis of petitioner's claim seems to be that the judgment of the Florida courts upholding the validity of the Cuban divorce decree had the effect of depriving her of her inchoate right of dower in violation of the due process clause.

Florida long ago held that the Legislature could take away the husband's common law right of curtesy and did do so *by implication* in passing a statute of distribution making him his wife's heir.

Herzog v. *Trust Company of Easton*, (1914) 67 Fla. 54, 64 So. 426.

In the absence of a statute saving the wife's right of dower, a divorce decree terminates it and is a complete defense to any claim therefor after the husband's death.

North v. *Ringling*, (1942) 149 Fla. 739, 7 So. 2d 476.

Dower has always been a creature of statute and the right to collect it accrues only on the death of the husband if the marriage is valid and existing at that time.

Bennett v. *Bennett*, (1946) 157 Fla. 627, 26 So. 2d 650.

Bowler v. *Bowler*, (1947) 159 Fla. 447, 31 So. 2d 751.

BLEED THROUGH POOR COPY

Dower is not a privilege nor an immunity of citizenship within the meaning of the Privileges and Immunities Clause or the Fourteenth Amendment and neither provision of the Constitution takes from the states the power to regulate the subject.

Ferry v. *Spokane P. & S. R. Company,* (1922) 258 U. S. 314.

Since the wife's right of dower is not a vested one, it is not protected from legislative impairment or destruction by the constitutional guarantees for the protection of property.

Randall v. *Keiger,* (1874) 23 Wall. 137.

In the case of *Merrill* v. *Fahs,* (1943) 51 F. Supp. 120, the District Court of the Southern District of Florida held that an antenuptial trust agreement based upon the release of dower rights was supported by a sufficient consideration and was not a taxable gift within the meaning of the Internal Revenue Act. The Court of Appeals for the Fifth Circuit reversed, saying:

> "* * * Merrill's expectancy of life was 18 or 19 years, and no actuary could foretell what personal property he would have at the end of that time, if any. His present personal wealth he might lose in his business or otherwise. As against the dower right he might give it away to his children, or freely dispose of it to suit himself in his lifetime. *Smith* v. *Hines,* 10 Fla. 258. It is hard to see where Merrill received any consideration on this item, since he could use and dispose of his personal property, except by will, without his wife's approval or consent. But her right in personal property, such as it was, was also subject to change by the legislature, and it so happens that the law was altered on April 21, 1939, while this transfer was in the making, so that the dower right was made subject to the husband's debts at death and to estate taxes. Laws of 1939, p. 16, Chap. 18999, F. S.

> A., Sec. 731.34. Again no actuary could estimate what Merrill's debts might be eighteen years hence. And yet further, the peculiar dower in personal property in Florida would be lost on Merrill's removal to a State which had no such law, for the law of the decedent's domicile governs the descent and distribution of movables. 15 C. J. S., Conflict of Laws, Sec. 18, p. 935. Merrill has already changed his domicile to New York. We see no way to arrive at the money value in 1939 of her prospective dower in personalty under the Florida law, except by the wildest guess." 142 F. 2d 651.

The judgment of the Court of Appeals for the Fifth Circuit was affirmed by this Court, 324 U. S. 308, and a rehearing was denied. *Ibid.* 888.

The case of *Adams* v. *Adams,* (1941) 147 Fla. 267, 2 So. 2d 855, would seem to be controlling. In that case the Florida Legislature passed an Act that affected an existing testamentary trust by limiting the dower rights of the widow to a child's share where the decedent was survived by lineal descendants by a former spouse. In an attack on the statute as unconstitutional, the Florida court squarely held that dower was not a "vested right" nor a "privilege" nor an "immunity" protected by the Constitution and that the Act did not deny the equal protection of the laws nor deprive the widow of her property without due process of law in violation of State and Federal constitutional provisions. An appeal to this Court was dismissed *as involving no substantial Federal question.* 314 U. S. 572.

To like effect see *Leffler* v. *Leffler,* (1942) 151 Fla. 455, 10 So. 2d 799.

BLEED THROUGH POOR COPY

THE FACTUAL ALLEGATIONS OF THE PETITION ARE INACCURATE AND INCOMPLETE.

While we doubt that it is the function of a brief in opposition to the issuance of the Writ of Certiorari to engage in a factual controversy, some statements made in support of the application for the Writ are for the obvious purpose of prejudicing the Court and therefore we shall briefly deal with them.

Pawley at all times was and is a citizen of the United States. He never pretended to be a Cuban citizen. He was born in South Carolina, moved to Cuba when he was a small boy and grew up there. He learned to speak the language like a native and became thoroughly familiar with the country. Two of his younger brothers were born there. His schoolmates thought he was a Cuban and nicknamed him "Cuba." He married the petitioner in Georgia in 1919. At that time he was living in Haiti where he went with his bride. Afterwards, they moved to Georgia and lived with her people for a short period. From there he went to New York, Canada and Delaware on various business ventures. In 1925, at the suggestion of his mother-in-law, he went to Miami during the Florida boom. *He had never set foot there before in his life.* He made money in the boom and lost it in the collapse and in 1929 was broke and looking for a job. Because of his familiarity with the country and the fluency with which he spoke the language, the Curtiss-Wright Company sent him to Havana to operate the Cuban National Aviation Company. He lived there with his family until 1932 when the company was sold to Pan American Airways.

Assuming that he established residence in Miami in 1925, he clearly abandoned it in 1929 and re-established his Cuban residence. When the Cuban company was sold,

his employers sent him to the Far East. Not knowing whether he was going to live there a month or ten years, on his way to China (R. 177) he left his wife and small children with her people in Miami (R. 79). After he got to China, he found opportunities for success were unusual. He tried repeatedly to get his wife to join him and live there with him, but she refused. These are the findings of the Master (R. 60-65). On this evidence, the state court found that she had deserted him (R. 494-504).

Was the petitioner's conduct such as gave Pawley the right *to inquire of a court* if he were entitled to a divorce? The affirmative answer to this question is fatal to the petitioner's case. If so, to what court should he turn? He was not a Chinaman, and the American courts in China were not functioning on account of the war—even if they could grant relief. He abandoned the Florida residence that he maintained during the boom from 1925 to 1929 and had not lived there since so he could not ask Florida courts for relief. Cuba was the last place where he lived with any intention of remaining permanently, and there he went.

The Cuban attorney employed by him to bring the divorce proceedings advised him to remain for the period of thirty days so that there would be no question about the period of his residence, and on this advice he acted. His residence there was sufficient without the thirty days (R. 237-8).

He left no home in Florida to sojourn in Cuba. He procured no American passport for this purpose. Mr. Pawley was on a Presidential mission of grave importance. At all times he carried a passport with him that entitled him to go anywhere.

The Cuban court issued process to Mrs. Pawley in the fall of 1942 and the Judge transmitted it with a copy of

BLEED THROUGH POOR COPY

the complaint to the Circuit Judge in Miami with the request that it be served in accordance with Florida laws. One of the Florida Judges issued written directions to the Sheriff to serve the summons and complaint on Mrs. Pawley in accordance with the Florida practice. The Deputy who made the service testified that she threw the papers in the street (R. 317-9) and she admitted that she had been advised by counsel to ignore them (R. 190). The Sheriff made the conventional return on the summons and thereafter Pawley's Cuban lawyer had another service made in like manner which was also ignored (R. 319). It is not contended that this service on Mrs. Pawley was sufficient to form the basis of a personal judgment against her but only that it gave her full notice of the institution of the suit and adequate opportunity to defend it. The Cuban divorce suit was not rushed through but was pending from the fall of 1942 to May of 1943 when a final decree was rendered, notice of which was likewise served on Mrs. Pawley in accordance with the Cuban practice (R. 263). The Cuban attorney who handled the case testified that the proceedings were in full conformity with the laws of Cuba (R. 251-3), and an English translation of the Cuban divorce law as well as an exemplified copy of the decree and a translation thereof were put in evidence. There was no proof offered to the contrary.

In many respects, the Cuban divorce law is similar to that of Florida and some of the grounds are identical, as are other features of their procedure. It is argued that Pawley did not sign the bill and was not in Cuba when it was filed, but it is not necessary under Florida practice for the plaintiff to sign a complaint for divorce nor to be physically present in the jurisdiction at the time of filing. It is also argued that he did not testify in the case and was not present when the decree was signed. Again, it is not

necessary that the plaintiff in a divorce case in Florida testify although it is customary. Nor is it necessary that he be within the jurisdiction when the decree is entered. Indeed, many times he is not.

In determining whether a foreign decree is entitled to recognition under principles of comity, the court in which the decree is challenged will not inquire into procedural methods which vary in different countries, yea in different states, or into such matters as credibility of witnesses, weight of evidence, etc., if it is satisfied that the foreign court had jurisdiction and an opportunity was given for fair trial under a system of jurisprudence likely to secure an impartial administration of justice between its residents and those of other countries and there is no prejudice in the court or the system of law under which it is sitting or any fraud in procuring the decree.

Parker v. *Parker, supra.*

Hilton v. *Guyot,* (1895) 159 U. S. 113.

There is not a word in the record to support counsel's statement that the testimony in the Cuban case was false. Even if it were, which we stoutly deny, that would afford no grounds for a review by this Court. The Cuban court was satisfied with it and the Florida courts, two of them, were satisfied with it.

In this day and age when friendly relations with Latin American countries are being stimulated by all, it is hardly consistent to say that we will not recognize the validity of their judicial proceedings on principles of international comity.

We will not dignify by answer the arguments about Pawley's second marriage to his secretary alleged to have taken place in six weeks. If the Cuban decree of divorce was valid, he had a right to remarry. Such questions can

BLEED THROUGH POOR COPY

be injected into the record for only one purpose. The same is true about his service as Ambassador to Peru and Brazil and his manner of living while he performed with credit those offices. The scale upon which Ambassadors to foreign countries are required to live is too well-known to need comment from us *and likewise presents no Federal question.*

The same is true with reference to the arguments about his leaving the wife who bore his children in dire straits, etc. The Chancellor found that he contributed approximately $170,000 to her for the years 1942 to 1947, inclusive, and the Florida Supreme Court has held that if he fails to contribute to her in the future, the doors of the Florida courts are still open to her.

WHAT WAS NECESSARY FOR PETITIONER TO BECOME VESTED WITH DOWER RIGHTS?

Dower in Florida consists of one-third of the real estate owned by the husband at the time of his death or which he had conveyed without the relinquishment of his wife's rights and one-third of the personal property owned at the time of his death (Sec. 731.34, Florida Statutes). There is no showing that Pawley owned any real estate in Florida except the Prairie Avenue and Pine Tree Drive houses the title to both of which was vested in him and his wife as an estate by the entireties[3] (R. 238). Therefore,

---

[3]Of course, petitioner would not be dowable in these. The entire estate would vest in the survivor upon the death of either co-owner. The property would be inalienable during the joint lives of the owners, except by joint conveyance, and upon divorce they would become equal joint tenants, an interest which would exceed dower.

in order for her inchoate right of dower ever to become vested, the following occurrences, as a minimum, would have to take place:

1. Pawley would have to die first.
2. They would have to still be married at the time of his death as a divorce at the instance of either would have prevented the dower right from vesting.
3. He would have had to be living in Florida as a permanent resident at the time of his death or in some other state that had similar statutory provisions for dower.
4. He would have had to own real estate at the time of his death or have owned it prior thereto and conveyed it without her relinquishing her dower and he would have had to own personal property.
5. If he was a resident of Florida or of a state having similar statutes, he must have failed to make a satisfactory provision for his widow by will.

These and other possibilities of extinguishing the inchoate right impelled the Court of Appeals for the Fifth Circuit to conclude that it was so vague that it would not supply the consideration of an antenuptial contract.

Fahs v. *Merrill, supra.*

Indeed, before the husband's death the wife can bring no action to recover dower or to preserve or protect her inchoate rights of dower.

Mayer v. *Reinecke*, (1942) (C. C. A. 7) 130 F. 2d 350, cert. den. 317 U. S. 684.

BLEED THROUGH POOR COPY

THE MARITAL CONTRACT IS NOT WITHIN THE PURVIEW OF THE FEDERAL CONSTITUTION.

In a nebulous way the petitioner suggests that she "has been deprived of her marital contract" by (*sic*) the due process of law accorded her by the Fifth and Fourteenth Amendments of the constitution.

As the Fifth Amendment on its face restrains national action only—unless by the impact of the Fourteenth—it operates on state action also. Some difficulty is encountered in determining how the action of the Florida courts offends it. Howbeit, the language of Chief Justice Marshall in the *Dartmouth College case* (4 Wheat. 518) would seem to settle it:

> "* * * The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional."

See also *Maynard* v. *Hill*, (1888) 125 U. S. 190.
Hunt v. *Hunt*, (1879) 131 U. S. Append. clxv.

It has generally been considered by the courts of this country, Federal and State, that marriage, though in some respects a contract, is not within the constitutional inter-

diction of legislative acts impairing the obligation of contracts.

Cabell v. *Cabell's Adm'r,* (1858) 58 Ky. (1 Metc.) 319.

Livingston v. *Livingston,* (1903) 173 N. Y. 377, 66 N. E. 123, 93 Am. St. Rep. 600, 61 L. R. A. 800.

White v. *White,* (1849) 5 Barb. (N. Y.) 474, 4 Howard's Pract. 102.

Rugh v. *Ottenheimer,* (1877) 6 Ore. 231, 25 Am. Rep. 513, 38 Pac. St. Rep. 231.

State v. *Tutty,* (1890) 41 F. 753, 7 L. R. A. 50.

CONCLUSION.

Let us recapitulate. Mrs. Pawley's bill sought separate maintenance only. She claimed that Pawley was her husband. She did not mention the Cuban divorce. She did not ask for dower. She did not ask for a division of the property or an allocation to her of any part of it. She sought alimony pure and simple.

The Court said that she was not entitled to maintain her bill not only because it recognized the validity of the Cuban decree of divorce but also because Pawley had been supporting her adequately.

The doors of the Court were not closed upon her. On the contrary, she was told expressly and clearly by the Florida Supreme Court that while the proceedings in the Cuban courts brought by Pawley and culminating in a decree of divorce were recognized as a valid dissolution of the bonds of matrimony, they did not discharge his obligation to support her, and while he was performing it at this time, nevertheless if he should cease to do so she was invited to come back and make her complaint

BLEED THROUGH POOR COPY

with the assurance that the doors of the Court would be open when she approached.

We respectfully submit that no right secured to her by the Federal Constitution has been infringed and that the petition should be denied.

PAUL R. SCOTT,
W. M. PRESTON,
A. L. MCCARTHY,
ROBERT H. ANDERSON,
Miami, Florida,
Attorneys for Respondent.

SCOTT M. LOFTIN,
Jacksonville, Florida,
Of Counsel.